United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

12

No. 24,053

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

EARNEST J. RATCLIFFE,

Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT EARNEST J. RATCLIFFE

Marsha E. Swiss
1614 - 20th Street, N. W.
Washington, D. C. 20009

Attorney for Appellant Earnest J. Ratcliffe
Appointed by this Court

United States Court of Appeals
for the District of Columbia Circuit
FILED MAR 30 1971
Nathan J. Paulson
CLERK

TABLE OF CONTENTS

TABLE OF CASES

*Denotes cases chiefly relied upon

I. STATEMENT OF QUESTIONS PRESENTED

1. Whether, in derogation of appellant's right to counsel, the court below erred in failing to suppress appellant's identification by a witness where appellant was brought before the witness in the custody of four police officers and without benefit of counsel two hours after the witness allegedly glimpsed him for only a minute in an automobile stopped 60 feet away from the witness and 20 blocks from the scene of the robbery of which appellant was accused.

2. Whether the circumstances of appellant's confrontation with the witness were so unnecessarily suggestive and conducive to irreparable mistaken identification as to deny appellant due process of law.

This case has not previously been before the court.

II. JURISDICTIONAL STATEMENT

This is an appeal under Title 28 U.S.C. § 1291 and Rule 37 of the Federal Rules of Criminal Procedure. Appellant Earnest J. Ratcliffe appeals from a judgment of conviction on five counts of an indictment charging him with armed robbery, robbery and assault with a dangerous weapon. By order of the District Court appellant was allowed to prosecute his appeal in forma pauperis.

III. REFERENCES TO RULINGS

The trial court's ruling concerning the admissibility of the evidence that forms the basis of this appeal is contained in pages 118-121 of the official transcript of the Hearing on the Motion to Suppress Identifications, of November 20 and 21, 1969.

IV. STATEMENT OF THE CASE

A. Proceedings Below

On November 20, 1968, Earnest Ratcliffe was indicted under Title 22, D. C. Code, Sections 2901, 3202, and 502 respectively for robbery, armed robbery, and assault with a dangerous weapon upon the manager and various other individuals employed by McDonald's Restaurant on DeaneAvenue, N. E., on September 17, 1968.

Ratcliffe entered a plea of not guilty on all counts of the six count indictment and asked for a jury trial. Prior to the trial, counsel for Ratcliffe brought a motion to suppress identification evidence obtained, inter alia, by photographs shown to a witness and by a direct confrontation between Ratcliffe and the same witness

brought about by the police two hours after the robbery and at a time when Ratcliffe lacked benefit of counsel. The Court, after holding a hearing on the motion on November 20 and 21, 1969, ruled that the witness be permitted to testify as to his identification of Ratcliffe at the time of confrontation, but ruled that evidence of the witness' photographic identification of Ratcliffe be excluded. (S.Tr. 118-121)*

The matter came to trial on January 12 and 13, 1970, in the United States District Court sitting with a jury. After hearing the evidence presented and the arguments of counsel, the jury found Ratcliffe guilty of armed robbery and of assault with a dangerous weapon, and acquitted him of robbery. The Court sentenced Ratcliffe to imprisonment for a period of from five to fifteen years for his conviction of armed robbery, and for a period of from three to ten years on his conviction of assault with a dangerous weapon. The sentences are to run concurrently.

From these convictions Ratcliffe appeals.

B. Statement of Facts

Insofar as they are relevant to the questions raised by this appeal, the facts are as follows.

About 9:25 on the morning of September 17, 1968, two young men, one short and one tall, approached Nathaniel Exom, manager of McDonald's Restaurant at Deane Avenue, N. E., just as he was moving the trash out of the back door in order to open the store for business. (Tr. 29, 31)**

---

* All references designated "S. Tr." are to pages of the official transcript of the hearing on the Motion to Suppress Identifications held on November 20 and 21, 1969.

** All references designated "Tr." are to pages of the official transcript of the trial held on January 12 and 13, 1970.

Both men carried guns. (Tr. 31). As the taller of the two gunmen ushered three McDonald employees into the walk-in freezer (Tr. 37), his accomplice escorted Mr. Exom to the safe and instructed him to open it (Tr. 36). Upon opening the safe, Mr. Exom moved aside and requested that he be placed in the freezing compartment with the other employees (Tr. 38). When the gunmen had departed and Mr. Exom emerged from the freezer, he found that two red moneybags containing about $170 or $180 had been taken (Tr. 41).

At 9:45 on the morning of September 17, 1968, Lawrence Cheffens was standing on the porch with a neighbor some 20 blocks from McDonald's (Tr. 85, 101, St. Tr. 15, 75). He observed a light colored automobile with a vinyl top pull up on the side of the road across from the porch about 60 feet away (Tr. 85, 95, S. Tr. 21). The car and driver stopped for only a minute (Tr. 89, 94) during which time the passenger emerged with something wrapped in newspapers that he placed under a stump in the adjacent woods (Tr. 87, S. Tr. 20). Cheffens testified both at the trial and at the hearing on the motion to suppress that he had never seen either of the occupants of the automobile before (Tr. 94, S. Tr. 20). After the automobile drove away Cheffens went into the woods and retrieved a package wrapped in newspaper from the log where he had seen it hidden (Tr. 89-90, S. Tr. 20). The package contained two red moneybags which were subsequently identified as the ones which had been taken from the McDonald's safe during the robbery (S. Tr. 67).

Cheffens immediately called the police (S. Tr. 22). He gave no detailed description of either the car or its occupants, except to the extent that he mentioned observing both a tall fellow and a light-

complexioned man who was driving the car (S. Tr. 67). The police arrived with a batch of photographs from which Cheffens selected a picture of Ratcliffe whom he identified as the driver of the vehicle (S. Tr. 22, 69, 79).

Having made this identification, Cheffens departed on his own business. (S. Tr. 23). Detective Harold H. Burwell, accompanied by Detectives Lucas, Fickling and Dunn of the Metropolitan police force, arrested Ratcliffe at his home at 11:17 on the basis of the photograph which Cheffens had selected. (Tr. 49, 50). Detective Burwell first took Ratcliffe to McDonald's Restaurant. No one identified him there (S. Tr. 49). Detective Burwell then conducted Ratcliffe, along with Michael Dorsey with whom he had been found, to Cheffens' house. The time was 11:47 in the morning. (S. Tr. 49). Cheffens described the scene upon his return as follows:

> "When I came back from the bank the police were there with the dogs and these fellows in the car and a sawed-off shotgun. (S. Tr. 23). . . .
>
> "They had two men in the back of the car. So when I drove up, they called me . . . beckoned for me to come there (S. Tr. 24). When they brought one man out of [the scout car], I pointed, I said, 'That's one'. . . Then they brought the dark fellow. I said, 'That's the one went across the woods, the other young man was driving the car'." (S. Tr. 26).

Detective Burwell confirmed this sequence of events. He testified that when Detectives Lucas and Dunn were standing in front of the house (S. Tr. 51), Cheffens talked to them while Detectives Fickling and Burwell had Ratcliffe and Dorsey get out of the car (S. Tr. 51). When Cheffens walked over, Detective Lucas said, "Have you seen either one of these men?" (S. Tr. 54). Cheffens responded by identifying them as the driver and passenger of the automobile he had seen parked outside earlier that day. (S. Tr. 54).

It was Cheffens' identification of Ratcliffe that counsel for Ratcliffe sought unsuccessfully to suppress prior to trial as unnecessarily suggestive. The trial court ruled that Cheffens would be permitted to testify as to what took place in front of his house, including his identification of Ratcliffe and Dorsey. (S. Tr. 118-119).

Stated the trial court, in relevant part:

> "I am perfectly willing to admit that that was a suggestive situation, just by virtue of the fact that there were police officers, some of whom were in uniform. . . . I am going to permit the identification, however, under the authority of Russell and Stewart, because of the fact that it happened a short time, within two hours, after the crime and more particularly within forty-five minutes after the first time Cheffens allegedly saw the defendant." (S. Tr. 119).

Earnest J. Ratcliffe testified at the trial on his own behalf. He stated that at 7:00 on the morning of the robbery he went to Fort

DuPont Park to work for the Park Service (Tr. 102). Approximately one-half hour later he went to Seat Pleasant to clean up the grounds (Tr. 102). Then he went to Michael Dorsey's house and afterwards he went outside with friends (Tr. 102-103, 108). Ratcliffe testified that at 9:30, the time of the McDonald's robbery, he had been detained by a police officer for questioning in connection with another crime (Tr. 103, 108-110). The police officer let him go. Ratcliffe testified that the police than arrested him in connection with the McDonald's robbery when he got home about 11:00 o'clock (Tr. 103). He stated that he did not go near McDonald's Restaurant on the day of the robbery, that he had no driver's license and that he could not drive an automobile (Tr. 104).

ARGUMENT

THE TRIAL COURT'S FAILURE TO SUPPRESS APPELLANT'S IDENTIFICATION BY A WITNESS WHERE APPELLANT WAS BROUGHT BEFORE THE WITNESS IN THE CUSTODY OF FOUR POLICE OFFICERS AND WITHOUT BENEFIT OF COUNSEL TWO HOURS AFTER THE WITNESS ALLEGEDLY GLIMPSED HIM FOR ONLY A MINUTE IN AN AUTOMOBILE STOPPED 60 FEET AWAY FROM THE WITNESS AND 20 BLOCKS FROM THE SCENE OF THE ROBBERY OF WHICH APPELLANT WAS ACCUSED VIOLATED APPELLANT'S RIGHT TO COUNSEL AND WAS SO UNNECESSARILY SUGGESTIVE AS TO DEPRIVE APPELLANT OF DUE PROCESS OF LAW

The question presented for review by this court is the validity of Ratcliffe's identification by Cheffens in a direct confrontation more than two hours after Mr. Cheffens allegedly observed Ratcliffe whom he had never seen before, for only a minute, where the police presented Ratcliffe to Cheffens for identification without a line-up and without benefit of counsel.*

---

* The court's attention is invited to the court's ruling concerning this evidence, contained at S. Tr. 118-121 and the description of the confrontation described by the witness at S. Tr. 23-26.

Cheffens did not witness the robbery of McDonald's Restaurant. He was nowhere near the scene of the crime at the time it occurred at about 9:30 on the morning of September 17, 1968. Instead, Cheffens was standing on the back porch with a neighbor when, at 9:45 that same morning, he observed a two-toned automobile drive up and stop momentarily by the side of the road some 50 feet from the porch. What Cheffens witnessed was a man alighting from the passenger's side of the automobile who walked over to the woods along the road and pushed something under a log. Cheffens' attention naturally fastened upon the figure in the woods rather than upon the automobile or its driver who also, Cheffens recalled, turned around and looked toward the woods. (S. Tr. 20, 40). Cheffens' limited opportunity to view the driver of the automobile was apparent in the description of the car and its occupants he gave by phone to the police. He stated only that "there was one fellow who was tall who took the package over there, and the other one, who was driving the car, was light complexioned." (S.Tr. 67).

We do not know the conditions under which Cheffens identified Ratcliffe from a photograph shown to him by the police. Evidence of the photographic identification was suppressed when it emerged at the hearing that the pictures from which Cheffens made his selection were destroyed. (S. Tr. 81, 119). The court properly refused to speculate as to whether the manner of the presentation of the photographs was prejudicial.

Nonetheless, acting upon Cheffens' selection, the police arrested Ratcliffe at his home and brought him to McDonald's Restaurant. None of the robbery victims was able to make an identification. By the

time the police brought Ratcliffe and his friend Michael Dorsey to Cheffens for identification at 11:47 am, more than two hours had elapsed since Cheffens glimpsed what he thought was a suspicious duo outside his house.*

Central to the right of every man accused of a crime to the assistance of counsel is the notion that legal assistance if it is to be effectively rendered must be available "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." United States v. Wade, 388 U. S. 218, 226 (1967). The confrontation at Cheffens' house was such a critical stage of the prosecution. It was there that the dangers for Ratcliffe were particularly grave, because Cheffens' "opportunity for observation was insubstantial, and his susceptibility to suggestion the greatest." United States v. Wade, 388 U. S. 218, at 229. Nor would a line-up and counsel have been difficult to arrange. Ratcliffe's arrest occurred shortly before noon when the mechanics of arranging a line-up would have imposed no unusual burden upon law enforcement personnel. The witness was available and cooperative. He was, as far as anyone then knew, the sole person who could link Ratcliffe with the robbery at McDonald's Restaurant or exonerate him of that offense. It was, therefore, with considerable insight that the Wade court observed:

---

* The trial court appears to have misconstrued the time sequence by stating that the identification happened "within forty-five minutes after the first time Cheffens allegedly saw the defendant," (S. Tr. 119). In fact the forty-five minutes to which the court referred marked the time interval between Cheffens' selection of Ratcliffe's photograph and his confrontation with Ratcliffe (S. Tr. 23, 29).

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the state aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment rendered by the witness--'that's the man'." 388 U.S. 218, at 235-236.

In addition to his lack of effective assistance of counsel at a critical stage of the proceedings, appellant further contends that the circumstances of his confrontation with Cheffens were unnecessarily suggestive under the principles set forth in Stovall v. Denno, 388 U. S. 293 (1967). Cheffens returned home to an impressive array of squad cars, policemen, and dogs waiting for him. Obviously his presence was needed. Obviously he was to play an important role in the events to follow. "They called me . . . beckoned for me to come there," Cheffens testified (S. Tr. 24). Cheffens came. When Ratcliffe emerged from the back of the car, Cheffens identified him as the driver of the vehicle he had observed earlier, and he identified Michael Dorsey as the man who went into the woods. The circumstances permitted no other choice.

Appellant contends that neither of the cases cited by the trial court in denying the motion to suppress Cheffens' identification are controlling. Both Stewart v. United States, 418 F.2d 1110 (C.A.D.C., 1969), 135 U. S. App. D. C. 274, and Russell v. United States, 408 F.2d

1280 (C.A.D.C., 1969), 133 U. S. App. D. C. 77, involve a confrontation between the witness and the accused within minutes of the witness' alleged viewing of the accused, not, as in this case, two hours after the alleged viewing. In Stewart, the witness had ample opportunity to observe the accused because they had gone drinking together. The accused stole the witness' watch and money clip and later abandoned the loot in full view of the witness and the police from whom he was fleeing.

In Russell, the witness investigated sounds of breaking glass and watched a man emerge from a radio shop. He immediately gave the police a detailed description of the man he had observed and a squad car within minutes sighted Russell who matched that description. As in Stewart, when the squad car approached the suspect fled. The police followed him to this home where they discovered him in possession of a radio, cigarettes and small change. He had a coat hanger and screwdriver in his pocket. He was wearing gloves, notwithstanding the warm summer night. The officers arrested him and brought him back to the witness who identified him immediately as the man he had seen emerge from the shop only a few minutes before.

The Court allowed the witness to testify concerning his identification of Russell but stated:

> "We wish to make clear that the holding of this case approves only those on-the-scene identifications which occur within minutes of the witnessed crime." (Emphasis supplied). 408 F.2d 1280, at 1284, fn. 20.

Significantly, in a case decided subsequent to Russell and Stewart, this court reaffirmed its position that the benefits to be gained by prompt identification do not outweigh the dangers of presenting the accused singly to a witness for identification without the safeguards provided by a formal line-up. In McRae v. United States, 420 F.2d 1283 (C.A.D.C., 1969), -----U. S. App. D. C. -----, as in this case, the accused was brought to the witness for identification in a police cruiser. The confrontation took place four hours after the alleged offense. Stated the Court:

> "At some point the nexus of time and place between offense and identification must become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses. We conclude that this point was reached, and more, in this case." 420 F.2d 1283, at 1290.

Accordingly, the Court reversed and remanded the case to the trial court to determine whether there was "an independent source" supporting the probable reliability of the confrontation that the Court held unnecessarily suggestive. 420 F.2d 1283, at 1291.

There is no such reliable independent source in this case. The image of the photograph Cheffens selected under circumstances which rendered the fact of the selection inadmissible evidence may well have superceded Cheffens' original visual impression of the driver of the automobile, particularly because Cheffens had only a minute to glimpse the driver before the car pulled away. Thus, the so-called independent source of Cheffens' identification at both the out-of-court confrontation

that followed the selection of the photograph or at the in-court hearing on the motion to suppress is open to considerable doubt. In the words of the Supreme Court,

> "Insofar as the accused's conviction may rest upon a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." United States v. Wade, 388 U. S. 218, at 235 (1967).

Appellant contends that no independent source exists to buttress the reliability of an identification that was otherwise unnecessarily suggestive.

CONCLUSION

For the reasons stated above, appellant prays that this conviction be reversed.

Respectfully submitted,

Marsha E. Swiss
1614 - 20th Street, N. W.
Washington, D. C. 20009
Attorney for Appellant
Appointed by this Court

Certificate of Service

I hereby certify that on this day of March, 1971, I caused to be personally served a copy of the foregoing brief for Appellant upon Thomas Flannery, Esq., U. S. Attorney, U. S. Courthouse, Washington, D. C., counsel for Appellee.

Marsha E. Swiss

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,053

UNITED STATES OF AMERICA, APPELLEE

v.

EARNEST J. RATCLIFFE, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN F. EVANS,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

Cr. No. 1878-68

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 10 1971

Nathan J. Paulson
CLERK

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Can an appellate attack on an identification of appellant while in police custody be meritorious when that identification, while correctly ruled admissible following extensive pre-trial testimony, was not introduced at trial?

---

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,053

UNITED STATES OF AMERICA, APPELLEE

v.

EARNEST J. RATCLIFFE, APPELLANT

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Charged in a six count indictment with armed robbery (22 D.C. Code § 3202), robbery (22 D.C. Code § 2901), and assault with a dangerous weapon (22 D.C. Code § 502-four counts involving victims Nathaniel Exum, Joe Miller, Ralph Edwards, and Keith Yancy), appellant was tried by jury January 12-13, 1970 before Judge John H. Pratt and found guilty of armed robbery and assault with a dangerous weapon (all four counts).[1] A month later, he was sentenced to serve concurrent

[1] Appellant was jointly indicted with Michael R. Dorsey but separate trials were ordered June 26, 1969. Cr. No. 1878-68.

terms of imprisonment of five to fifteen years for the robbery and three to ten years for each assault with a dangerous weapon offense. (These sentences were to be served consecutively to a sentence being served under the Youth Corrections Act in another case, Cr. No. 1188-68).

The instant offenses arose from the holdup of a McDonald's shop located at Deane and Minnesota Avenues, N.E. on September 17, 1968 around 9:25 a.m. by two armed men wearing stocking masks who took approximately $186.00 in two money bags (Tr. 29-30, 33, 41, 52-53). None of the four McDonald's employees, including the manager (Nathaniel Exum) who was made to open the safe before being put in a walk-in freezer with the other employees, could identify the holdup men, except as to general height and stature (Tr. 33, 36-38, 53-54, 59). However, events before and after the holdup indicated appellant was one of the robbers.

Around 9:15 a.m., short time before the robbery, Frank Evans, who lived at 4319 Hunt Place, N.E., about a half block from McDonald's, saw a car come into the alley where he was repairing his car (Tr. 60-63). The car, a two-tone Pontiac, (Tr. 4, 71), turned around in the alley and parked a short distance from him, actually only a few feet from the back porch of a neighbor, Mrs. Augustine Slade, who had been talking with Evans from her porch (at 4305) (Tr. 63, 64, 67, 71). The driver stayed in the car. In about five or ten minutes two men came running into the alley and before they got into the car and sped away, Mrs. Slade recognized one of them as appellant whom she knew as a neighborhood youngster whose family, which she also knew, lived only about a block and a half from her (Tr. 63, 64, 68, 70-71, 73-75, 80).[2]

---

[2] Mrs. Slade testified similarly at a pre-trial identification hearing, and though her identification testimony appeared not to be the object of suppression, as was the identification by another witness, Lawrence Chaffens, the court had ruled that her in-court identification would be permitted (Hearing Transcript, hereinafter "H. Tr.," 7-10, 13).

Around 9:45 a.m., which would have been a few minutes after the holdup, Mr. Lawrence Cheffens who lived at 4451 C Street, S.E., was talking with a neighbor, since deceased, on the latter's porch when he became suspicious of two men who drove up in a two-tone car (a Pontiac or Plymouth possibly) and parked on the opposite side of the street, less than 60 feet away, near a park (Tr. 85-86, 89, 95). Fearing they be dangerous and watching them carefully, Mr. Cheffens saw the passenger walk a short distance into the wooded area of the park and conceal something wrapped in newspaper under a bush or stump (Tr. 87). The driver, who turned frequently and provided a full face view, was identified by Mr. Cheffens as appellant (Tr. 86-88, 93, 96). After the passenger returned to the car and the car left, Mr. Cheffens went to the wooded area and recovered the newspaper bundle which contained two McDonald money bags. He called the police (Tr. 89-90, 92).[3]

Appellant was arrested at his home at 4453 Gault Place, N.E. around 1:07 a.m. and was wearing a blue sweater-type shirt with blue stripes (Tr. 98, 100) which conformed to a description of dress given by McDonald victims (Tr. 33-34, 58). Appellant put on a jacket which generally matched the description of one given by Mr. Cheffens when he saw appellant as the driver of the car near his house (Tr. 88, 94). (Appellant's former co-defendant, Michael Dorsey, was at appellant's home at this time also and his dress generally conformed to a description of the second robber, (Tr. 34, 97, 99).

In raising an alibi defense, appellant claimed that on the morning in question he and others, whose full names

---

[3] These circumstances were the basis for the only trial identification that Mr. Cheffens made of appellant. However, as revealed at the identification hearing, Mr. Cheffens after the police arrived made a photographic identification of appellant, which was the basis for appellant's arrest, and also identified him within an hour, in police custody near his home (H. Tr. 22-25). The latter in flesh identification was ruled admissible after the identification hearing (H. Tr. 119), see text, *infra*, and is under attack in the instant appeal, but this identification was not introduced at trial.

he did not know, cleaned certain park grounds in Seat Pleasant, Maryland and from there he went to the residence of Michael Dorsey (Tr. 102-103). After remaining there about five minutes he left, and while walking along the street he was stopped by a policeman who questioned him briefly about a robbery, unrelated to the instant one. After that he went to a playground where he stayed until about 11:00 a.m. (Tr. 102-103, 110). He denied the instant offense and claimed further that he could not drive a car (Tr. 104).

The Idenitfication Hearing

At the pre-trial hearing to suppress identification testimony, (November 20-21, 1969, January 12, 1970), the principal witnesses at trial testified.[4] Mrs. Slade's testimony was substantially the same as that given at trial, *supra*. The trial court ruled that her identification of appellant would be admissible (H. Tr. 7-10, 13).

Mr. Cheffens testimony at the hearing was substantially the same as his trial testimony, except that he related events subsequent to his first observation of appellant around 10:00 or 10:15 a.m. when evidence of the holdup was being concealed. After he recovered the McDonald money bags and called the police, he was shown several photographs by officers who came to his house and he identified a photograph of appellant. He then made an errand to the bank and about the time that he returned around 11:00 a.m. several police officers arrived who called him to their car (H. Tr. 22-24). Mr. Cheffens did not know that any suspects had been arrested or that he was being called to make any identification (H. Tr. 27-28, 43).

---

[4] One witness, Melvin Jones, a driver for a cleaners next door to McDonald's scrutinized and identified appellant shortly before the McDonald's holdup, because he feared appellant and his comrade, suspiciously attempting to conceal themselves, were about to rob him (Tr. 11-20). He was not called as a witness at trial however, though his identification was ruled admissible (Tr. 23).

However, when appellant alighted from the car Mr. Cheffens immediately said, "That's one," and also identified another person (Dorsey), telling what he had previously observed each of them do ("That's the one [that] went across the woods, the other young man was driving the car," (Tr. 25, 44). Appellant and Dorsey were not handcuffed and Mr. Cheffens originally did not know whether they might be suspects or police officers (Tr. 27-29). In point of time, Mr. Cheffens estimated it was 45 minutes between the time that he first saw appellant and his companion parked near the wooded area and the time that he identified them in apparent police custody (H. Tr. 29-30, 42, 75).

Testimony of the police officers (Detectives Harold Burwell and Wilbert Dunn) indicated that after Cheffens' photographic identification of appellant, appellant was arrested at his home, and together with Dorsey, who voluntarily accompanied the police officers, taken to McDonald's where no identification was made (H. Tr. 49). From there, the suspects were taken to Cheffens' place about the time that Cheffens arrived himself. One Officer (Fickling) sat in the front of the car, while Detective Burwell sat in the rear with the two suspects (H. Tr. 50-52). Detective Burwell testified that another officer (Detective Lucas) had told him that appellant and Dorsey had been identified by Cheffens in the car with specific description of their individual conduct, but Detective Burwell arranged for Cheffens to be brought to the car where the identifications could be made in the presence of the suspects. Cheffens did so when the suspects alighted from the car and again described their individual conduct (H. Tr. 53-54).[5]

Detective Burwell further testified that it was his practice at the time (September 1968) whenever "some-

---

[5] Appellant's arrest was stipulated to be at about 11:15 a.m. (H. Tr. 62). The time of the police officers' arrival at Cheffens' house was given roughly as 11:47 a.m. (H. Tr. 49-50), making the time about an hour and a half to an hour and forty-five minutes at the most from Cheffens' original observation of appellant (10:00 or 10:15 a.m.) to the identification made after appellant's arrest.

one was arrested near the scene or immediately after the crime had been committed" to ascertain if any victim or witness could make an identification (H. Tr. 55-56). The earliest that any lineup could have been arranged in this case (prior to new lineup procedures) was in the afternoon (H. Tr. 57).

Following the conclusion of the testimony, the court made the following rulings with regard to the identifications made by Cheffens:

> (1) that his original observation and identification of appellant (as the driver of a car) was admissible at trial (this was the only Cheffens' identification introduced by the Government at trial);
>
> (2) that his second identification of appellant in police custody, and without counsel, would also be admissible, since this single-suspect confrontation was not in violation to any right to counsel, and while suggestive in some respects, was not sufficiently so to render an in-court identification violative of due process[6] (nonetheless, the Government did not introduce this identification at trial); and
>
> (3) that his second identification had an independent source though it was unnecessary to make that explicit finding (H. Tr. 118-121).[7]

---

[6] I am going to permit the identification, however, under the authority of *Russell* (v. *United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280 (1969)) and *Stewart* (v. *United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110 (1969)), because of the fact that it happened a short time, within two hours, after the crime and more particularly within 45 minutes after the first time Cheffens allegedly saw the defendant (H. Tr. 119).

(Appellant's criticism of the court's construction of the amount of time involved (br. 8-9) is not well-taken. Cheffens did *clearly* testify that there was about 45 minutes between his observations of appellant (H. Tr. 29-30). In any event, while the time lapse might have been an hour and a half or an hour and forty-five minutes, based on other testimony, see note 5 *supra*, no where does it appear that the time was "more than two hours" as appellant desires to view it (br. 9)).

[7] The court excluded Cheffens' photographic identification, incidentally, not because the photographs had been "destroyed" as appellant erroneously characterizes it (br. 8), but because the

ARGUMENT

Appellant's apparent claim that Mr. Cheffens' in-court identification was improperly allowed is without merit.

(H. Tr. 118-121)

Appellant seemingly claims that the identification of him by Lawrence Cheffens, who observed him in police custody, should not have been introduced at trial because (1) it occurred in the absence of counsel in violation of *Wade*[8] and (2) was so unnecessarily suggestive as to violate due process of law.[9] We view the claim as utterly frivolous.

Lest, it might appear otherwise, we hasten to point out that the identification by Cheffens against which appellant has mounted his appellate attack was not even introduced into evidence by the Government, though it had been ruled admissible following the pre-trial hearing (H. Tr. 118-121). The identification that was introduced merely resulted from Mr. Cheffens' original viewing of appellant, at first suspiciously and then intensely, as he happened to observe appellant as the driver of a car from which a passenger alighted to conceal something, McDonald's money bags it was discovered, in the nearby woods. This identification, resulting from sheer coincidence, did not involve police conduct whatever and could not provide a sound basis for attack.[10] See *United States* v. *Green*, —— U.S. App. D.C. ——, 436 F.2d 290 (1970); *United States* v. *Venere*, 416 F.2d 144, 148 (5th Cir. 1969) (opinion by J. McGowan).

---

pictures shown Cheffens were not preserved, having been returned to police files for use in other cases without a record being made (H. Tr. 80-82, 119).

[8] *Wade* v. *United States*, 388 U.S. 218 (1967).

[9] *Stovall* v. *Denno*, 388 U.S. 293 (1967).

[10] Nor does it appear that appellant himself questioned the admissibility of this identification at the hearing (H. Tr. 94-95). Should appellant's present argument be construed to mean that this single in-court identification by Cheffens was tainted by the street confrontation, assuming of course it was impermissibly

The Government's decision to elicit only the original identification from Mr. Cheffens, has left appellant in our view without any valid complaint, if any there was, on this appeal.[11]

---

suggestive, then that argument should similarly be summarily rejected since Mr. Cheffens observed appellant intently and at length during his original and suspicious observation of him, a fact which justified the view here that the in-court identification had an independent source (H. Tr. 121). See *United States* v. *Green, supra; Clemons* v. *United States,* 133 U.S. App. D.C. 27, 408 F.2d 1230 (1969) (*en banc*); *Russell* v. *United States,* 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied,* 395 U.S. 928 (1969).

[11] Nonetheless, the eminent correctness of the trial court's ruling to permit introduction of the later identification of appellant while he was in police custody may be briefly demonstrated. Within two hours of the holdup and about 45 minutes of Cheffens' earlier observation of appellant, appellant was identified in police custody, though Cheffens, a stable and observant non-victim witness, was apparently unaware he was even a suspect. This prompt confrontation assured the reliability of Cheffens' photographic identification (which as stated previously was before the police had any suspects) and afforded a viewing while Cheffens' mental image was still fresh. As the trial court reasoned (H. Tr. 119-120) on the authority of *Stewart* v. *United States,* 135 U.S. App. D.C. 274, 418 F.2d 1110 (1969) and *Russell* v. *United States, supra* note 10, such confrontations "proximate to the scene and time of the offense as well as the apprehension," *Stewart* v. *United States, supra* at 277, 418 F.2d at 1113, quoting from *Wise* v. *United States,* 127 U.S. App. D.C. 279, 282, 383 F.2d 206, 209 (1969), *cert. denied,* 390 U.S. 964 (1968), are made in the interest of speedy identification and justify the absence of counsel, see, *e.g., United States* v. *Perry (Franklin),* D.C. Cir. No. 22,469, June 1, 1971; *United States* v. *Green, supra; Russell* v. *United States, supra;* compare *McRae* v. *United States,* 137 U.S. App. D.C. 80, 87, 420 F.2d 1283, 1290 (1969), futilely relied on by appellant (br. 12) where the confrontation in the police context occurred nearly four hours after the offense.

(It hardly seems appropriate to argue on this record that introduction of Cheffens' identification was harmless error, see *Chapman* v. *California,* 383 U.S. 18 (1967) and *Harrington* v. *California,* 395 U.S. 250 (1969), since it implies that the confrontation here was conducted in an impermissible manner which we have merely assumed *arguendo* in suggesting the absence of taint, see note 10, *supra*; but it is significant to note that appellant's complicity in the holdup assuredly rested substantially on the solid and unimpeachable identification of him by Mrs. Slade, who was acquainted with him. (See Counterstatement).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN F. EVANS,
JULIUS A. JOHNSON,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 426464 685